Federal Communications Commission
Washington, D.C.

February 2, 2000

Swindler Berlin Shereff Friedman, LLP
c/o Antony Richard Petrilla
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Re: Acceptance of Comments As Timely Filed in (Docket No. 96-98)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceeding as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(I), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
for Magalie Roman Salas
Secretary

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January 20, 2000

BY HAND

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Request to Accept Late-Filed Comments of RCN Telecom Services, Inc. in CC Docket 96-98

Dear Ms. Salas:

Please accept as late-filed the enclosed original and four (4) copies of the Comments of RCN Telecom Services, Inc. ("RCN") in CC Docket No. 96-98. I attempted to file these comments last night using the Commission's Electronic Comment Filing System ("ECFS"). That system would not accept the comments. I complained to Bill Cline (whose is listed as a contact person for ECFS on the Commission's Web site) about ECFS's apparent malfunction. He attempted to correct the problem, but eventually informed me (after it was too late to file paper copies of the comments) that ECFS was completely unavailable and would not accept any filings last night. He stated that he would send an email to your office, notifying you of ECFS's malfunction. For these reasons, please accept RCN's comments as late-filed.

Please call me if you have any questions regarding this request.

Sincerely,

Antony Richard Petrilla

Counsel for RCN Telecom Services, Inc.

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
of the Telecommunications Act of 1996	)	

COMMENTS OF RCN TELECOM SERVICES, INC. ON FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

RCN Telecom Services, Inc. ("RCN"), through its undersigned counsel, hereby submits its comments upon the Commission's Fourth Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned case.[1/]

SUMMARY AND INTRODUCTION

RCN argues below that:

- the plain language of 47 U.S.C. § 251(c)(3) does not permit the Commission to place usage restrictions upon unbundled network elements ("UNEs");
- the Commission cannot lawfully preserve the special access revenues of incumbent local exchange carriers ("ILECs") under the guise of ensuring universal service pursuant to 47 U.S.C. § 254;
- special access rates likely contain few universal service subsidies for the Commission to protect; and
- the possibility that ILECs will suffer financially in the absence of Commission rules restricting the use of UNEs is not a valid justification for such restrictions.

1/ RCN also responds, where appropriate, to the request for comments in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket No. 96-98, FCC 99-370 (rel. November 24, 1999) ("*Supplemental Order*").

ARGUMENT

I. THE COMMISSION WOULD VIOLATE FEDERAL LAW IF IT RESTRICTED THE RIGHT OF REQUESTING CARRIERS TO USE UNES TO OFFER INTEREXCHANGE SERVICES AND EXCHANGE ACCESS

When the Commission first addressed this issue in the *Local Competition Order*,[2/] it correctly ruled that it lacked authority under the Communications Act of 1934 ("Act"), as amended, to restrict the right of requesting carriers to use UNEs to offer interexchange services and exchange access. *See Local Competition Order*, ¶ 356. The Commission reasoned that Section 251(c)(3) of the Act, which defines the ILEC's responsibility to provide UNEs, places only one restriction upon the use of UNEs: requesting carriers must use them "for the provision of a telecommunications service." *Id.*; *see Supplemental Order*, Dissenting Statement of Commissioner Harold Furchtgott-Roth. Since exchange access and interexchange service are "telecommunications service[s]" within the meaning of the Act, 47 U.S.C. § 153(46), the Commission found that requesting carriers may use UNEs to offer such services. *Local Competition Order*, ¶ 356. The Commission's conclusion was correct.

The Commission now asks whether it can deviate from this conclusion and subject UNEs to usage restrictions. The law has not changed since the Commission released the *Local Competition Order*. It is still impermissible for the Commission to attach usage restrictions to UNEs. The Commission should reaffirm its conclusion in the *Local Competition Order* that requesting carriers may use UNEs to offer exchange access and interexchange services.

[2/] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report & Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("*Local Competition Order*").

In the FNPRM, the Commission notes that the *Local Competition Order* transitionally required UNE purchasers to pay certain access charges, suggesting that that kind of deviation from the plain language of Section 251(c)(3) may be appropriate in this case. *See* FNPRM, ¶ 492. While the Commission did adopt a transitional access charge for UNEs, the Commission should not forget that it simultaneously concluded that it could "conceive of no circumstances under which the requirement that certain entrants pay [these access charges] . . . would be extended further." *Local Competition Order*, ¶ 725. Indeed, the Eighth Circuit Court of Appeals upheld the Commission's transitional access charge, despite finding it "at first blush . . . to be reversible," on the ground that the charge was interim and deference should be accorded to interim agency rules. *CompTel v. FCC*, 117 F.3d 1068, 1074, 1075 (8th Cir. June 27, 1997). Had the Commission promulgated permanent rules restricting the use of UNEs, the Court's ruling likely would have gone the other way.

The FNPRM asks whether the Commission may rely upon the "just and reasonable" language of Section 251(c) of the Act to justify placing usage restrictions upon UNEs. FNPRM, ¶ 495. It may not. The standard to which the Commission refers appears in Section 251(c)(3), which states that ILECs must offer UNEs on "rates, terms, and conditions that are just, reasonable and nondiscriminatory." *See* 47 U.S.C. § 251(c)(3). The Commission interpreted this requirement in the *Local Competition Order* (at ¶ 315) as follows:

> The duty to provide unbundled network elements on 'terms, and conditions that are just, reasonable, and nondiscriminatory' means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, *they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.*

(Emphasis added). Plainly, when ILECs provision network elements within their own networks, they do so under terms and conditions that do not include usage restrictions. Unless the Commission plans to reverse its interpretation of "just, reasonable and nondiscriminatory" in the *Local Competition Order*, it cannot rely upon that language now to support usage restrictions that would apply only to CLECs.

The FNPRM asks interested parties to comment upon the possibility of the Commission justifying UNE usage restrictions upon Section 251(g) of the Act. FNPRM, ¶ 495. That provision does not appear to be relevant to the FNPRM's inquiry. Section 251(g) addresses the continuing obligations of LECs to provide

> exchange access, information access, and exchange services for . . . access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier[s] on the date immediately preceding the date of enactment of the Telecommunications Act of 1996.

47 U.S.C. § 251(g). Nothing in this provision would justify placing usage restrictions upon UNEs.

The FNPRM also asks interested parties whether any other provision of the Act would provide a "statutory basis usage" restrictions for UNEs. FNPRM, ¶ 495. There is no such "other" provision. Section 251(c)(3) is the only provision in the Act that sets forth the standard for determining whether the terms and conditions (as distinct from rates)[3/] upon which ILECs offer UNEs are appropriate. As discussed above, placing usage restrictions upon UNEs would violate Section 251(c)(3).

[3/] Section 252(d)(1) of the Act, for instance, sets forth standards for evaluating UNE rates, but does not discuss standards for the terms and conditions upon which UNEs are offered.

II. ILECS DO NOT HAVE A LEGALLY PROTECTED INTEREST IN USING SPECIAL ACCESS REVENUES AS PART OF A UNIVERSAL SERVICE PROGRAM

The FNPRM seeks "comment on the policy implications, if any, of a significant reduction in special access revenues for [its] universal service program." FNPRM, ¶ 496. RCN submits that: (1) the Commission cannot legally protect ILECs against the loss of special access revenues under the guise of a universal service program; and (2) in any event, the special access market has become sufficiently competitive that special access rates likely do not contain universal service subsidies.

A. Funding Universal Service through Subsidies Embedded in Special Access Rates Would Be Impermissible Under Section 254 of the Act

In seeking comment upon the possibility that a reduction in special access revenues would undermine its universal service program, the Commission assumes that it legally could have a universal service policy that relies upon subsidies embedded in special access rates. The Act makes abundantly clear that such a policy would be unlawful.

Section 254 of the Act requires the Commission's universal service program to be both "nondiscriminatory" and "explicit" and to provide "specific, sufficient and predictable" funding mechanisms. 47 U.S.C. § 254(b)(4), (b)(5), & (e). The use of special access subsidies for universal service purposes would violate each of these criteria. The Commission cannot deem such subsidies to constitute a nondiscriminatory universal service program because the mechanism relies upon the viability of the special access service offerings of one competitor in the marketplace, the ILEC, and would be unavailable to support the universal service offerings of other carriers.[4/] In fact, the

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[4/] *See Federal-State Joint Board on Universal Service*, Report and Order, CC Docket 96-45, FCC 97-157, at ¶ 757 (released May 8, 1997) ("*Joint Board Order*") (finding the inclusion of Long Term Support payments in switched access charges to be a "discriminatory

Commission heightened the Act's nondiscriminatory contribution requirement by adding "competitive neutrality" to the list of guiding principles for universal service. *Joint Board Order*, at ¶ 47. The Commission defined "competitive neutrality" as follows:

> competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.

Id. It is difficult to conceive of a less competitively neutral universal service program than one that depends upon the monopolist being able to sell a narrow set of services to a captive customer base. Manifestly, it would violate both the principle requiring nondiscriminatory contributions and the principle of competitive neutrality for the Commission to protect ILECs' special access revenues under the rubric of preserving universal service.

In addition, ILECs cannot seriously argue that special access subsidies are an "explicit" universal service program under 47 U.S.C. § 254(e). The Fifth Circuit Court of Appeals has held that including universal service contributions in switched interstate access charges constitutes an implicit subsidy forbidden by Section 254(e):

> We are convinced that the plain language of § 254(e) does not permit the FCC to maintain any implicit subsidies for universal service support. . . . Because the [FCC] continues to require implicit subsidies for ILEC's in violation of a plain, direct statutory command, *we reverse its decision to require ILEC's to recover universal service contributions from their interstate access charges.*[5/]

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universal service support mechanism").

[5/] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999), *petition for cert. filed*, __ U.S. __ (U.S. Dec. 23, 1999) (No. 99-1072) (emphasis added).

The Court's ruling applies with even more force to the inclusion of universal service contributions in special access charges. In *Texas Office of Public Utility Counsel*, the Court reversed the Commission's rule requiring ILECs to include a specific and known amount of universal service contributions in their switched access charges. *Id.* In the instant case, there is not a specific Commission rule requiring recovery of universal service through special access rates, and the Commission does not have any idea to what degree, if any, special access subsidies fund universal service. Even under the Commission's own interpretation of "explicit" in 47 U.S.C. § 254(e), which the Court reversed, the Commission would deem whatever subsidies exist in special access rates to be implicit and therefore part of an unlawful universal service support mechanism.

Lastly, protecting ILECs' contribution-laden special access rates hardly would qualify as a "specific, sufficient and predictable" universal service funding mechanism. *See* 47 U.S.C. § 254(b)(5). If, as noted above, the Commission has no idea what subsidies exist in special access rates, it cannot rule (as it must) that such subsidies comprise a "specific, sufficient and predictable" funding mechanism.

In short, the Commission may not consider the impact upon universal service of a significant reduction in special access revenues because Section 254 of the Act outlaws the use of special access subsidies as a universal service mechanism.

B. The Special Access Market Is Sufficiently Competitive that Special Access Rates May Not Contain Any Universal Service Subsidies for the Commission to Protect

Even if the Commission were to consider the impact upon universal service of a significant reduction in special access revenues, it would find that impact to be de minimis. As the ILECs

contend, special access is a competitive service.[6] ILECs have reduced their special access rates in order to respond to competition.[7] In the process, they have diminished, and perhaps eliminated, whatever universal service subsidies used to exist in special access rates. The notion that allowing CLECs to purchase an unrestricted EEL would cause ILECs to lose contribution toward universal service does not square with the realities of the competitive marketplace. Competition has already substantially eliminated such contribution.

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[6] *See, e.g.*, Comments of Ameritech, CC Docket Nos. 96-262 & 94-1, RM-9210, at 5 & Attachment B (October 26, 1998) ("Direct competition for ILEC dedicated service has been growing rapidly. Attachment B shows, for the seven major market areas in the Ameritech region, the growth in competitively provided transport services. The data tells a significant story -- with competitors holding 60% of DS1 equivalents in Chicago and 44% in the top seven market areas combined."); Comments of Bell Atlantic, CC Docket Nos. 96-262 & 94-1, RM-9210, at 9 (October 26, 1998) ("In addition to [] rapid growth in local exchange competition, the growth in direct competition to exchange access services themselves has been equally dramatic. Most significant has been the purchase of the largest competitive access providers by the largest long distance providers. Quite simply, this allows them quickly and easily to supplant Bell Atlantic's access service with internally provided connections through their new affiliates."); Comments of BellSouth Corporation and BellSouth Telecommunications, Inc., CC Docket Nos. 96-262, 94-1 & 97-250, RM-9210, at 13 (October 26, 1998) ("There is fierce competition for high capacity services with competitors capturing nearly 40 percent of the market in Atlanta and 30 percent in Florida.").

[7] ILECs have voluntarily set rates in the trunking basket for special access services below the relevant price cap for quite some time. *See, e.g., Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, FCC 94-10, at ¶ 25 (rel. February 16, 1994) (Ameritech, among other ILECs, priced special access 5.3% below the price cap); *NYNEX Telephone Companies 1995 Annual Access Tariff Filings, Transmittal Nos. 378, 1151, Request for Waiver*, Memorandum Opinion and Order, DA 95-1625, 11 FCC Rcd 5448, at ¶ 13 (rel. July 20, 1995) (NYNEX maintained below price cap pricing for special access services); see generally *Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 94-1, 93-124, & 93-197, FCC 95-393, at ¶ 145 (rel September 20, 1995) ("We believe that evidence that a price cap LEC is pricing services below the price cap ceiling over a sustained period of time may indicate that such services are subject to competitive pressures, particularly in markets with high supply and demand elasticities.").

III. THE POSSIBILITY THAT ILECS WILL SUFFER FINANCIALLY FAILS TO JUSTIFY RESTRICTING THE USE OF UNES

The FNPRM seeks comment upon the possibility that failing to restrict the use of UNEs could have a "large financial impact on incumbent local exchange carriers." FNPRM, ¶ 496. The FNPRM also asks whether the Commission should consider such an impact in reaching its decision in this case. *Id.*

The Commission should not seek to protect ILECs from competition resulting from faithful implementation of the Act. Congress passed the Act in order to open the markets of ILECs to competition. *See Local Competition Order*, at ¶ 1 ("Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition."). Congress understood that, for competitors to enter these markets successfully, they would need to take customers and profits away from ILECs. For that reason, Congress provided competitors with powerful tools for competing with ILECs, one of which is the requirement in Sections 251(c)(3) and 252(d)(1) that ILECs make UNEs available to competitors at cost-based prices. 47 U.S.C. §§ 251(c)(3) & 252(d)(1). The Commission has promulgated numerous rules designed to effectuate this requirement and thereby open ILEC markets. *See, e.g., Local Competition Order.* It would run directly contrary to Congressional intent for the Commission now to resist faithfully implementing the Act on the ground that competitors may use UNEs to undermine ILEC profit margins. The Commission has previously rejected ILEC arguments designed to preserve and protect historic revenue flows. *See, e.g., Local Competition Order*, at ¶¶ 615-17, 733-40 (rejecting Fifth Amendment takings arguments of ILECs). The Commission should not dilute these policies now by acceding to arguments that ILECs will be financially harmed if the Commission does not restrict

the use of UNEs. Accordingly, the Commission should not consider what financial impact its order in this case will have on ILECs.

CONCLUSION

For the foregoing reasons, the Commission should not restrict the use of UNEs as proposed by ILECs in this case.

Respectfully submitted,

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Dated: January 19, 2000